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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

GEORGE THOMAS DANSON,
Petitioner,
v.
THE SUPERIOR COURT OF
HUMBOLDT COUNTY,
Respondent;
THE PEOPLE,
Real Party in Interest.

A135710

(Humboldt County
Super. Ct. No. CR086327)

THE COURT:*

Petitioner George Thomas Danson contends in this writ proceeding that the trial court erroneously denied his request for a certificate of probable cause under Penal Code section 1237.5.¹ We agree that petitioner is entitled to writ relief.

BACKGROUND

Petitioner was charged with cultivating marijuana (Health & Saf. Code, § 11358), possession of marijuana for purposes of sale (Health & Saf. Code, § 11359) and possession of concentrated cannabis (Health & Saf. Code, § 11357, subd. (a)).

* Before Jones, P.J., Needham, J. and Bruiniers, J.

¹ All further statutory references are to the Penal Code, unless otherwise noted.

According to the record before us, the parties waived a jury trial, and certain procedures were to occur in lieu of trial. The court would conduct an Evidence Code section 402 hearing (402 hearing), which concerned whether petitioner could maintain a defense under the Compassionate Use Act (Health & Saf. Code, § 11362.5). The parties agreed that the court's determination following the 402 hearing would be "dispositive," in that "If there is no lawful defense the defendant would plea to a felony on the condition of no immediate state prison. If there was determined to be a lawful defense the People would dismiss."

At the conclusion of the 402 hearing, the trial court ruled that petitioner did not possess a lawful defense under the Compassionate Use Act. After the court announced its ruling, and before petitioner entered his guilty plea to possession of marijuana for purposes of sale, the following colloquy occurred:

"[PETITIONER'S COUNSEL]: I believe what I need to do is confer with my client as to whether he wishes to appeal because this is an important issue. On the other hand, he may very well on some point plea and get the case over with. . . . "THE COURT: . . . I think th[at] at this juncture, the only review I think would be by some kind of writ process. I don't know whether that's proper or not. There wouldn't be any appeal until we get to final judgment, and that would mean the plea and entry and potentially asking the Court for a stay for that to occur. But, again, I don't profess to have superior appellate knowledge.

"[PETITIONER'S COUNSEL]: Unfortunately, neither do I. But I will discuss with my client also entering a plea on the basis if he wishes to pursue the case at all further on the basis that it could be stayed pending the outcome. But let me talk to him for a couple minutes because I don't know his wishes. . . .

"[PETITIONER'S COUNSEL, AFTER PAUSE IN PROCEEDINGS]: Your Honor, my client and I feel that this is—a very important legal issue is at stake. What I would propose is that he enter the plea. I would ask you to stay everything to give us a reasonable period to file whatever it is, the writ, the appeal. . . .

“THE COURT: . . . My thought would be potentially we would continue the entry of the plea for a reasonable amount of time to prepare a writ because that would be—the issue from here would be a writ. . . .

“[PROSECUTOR]: Frankly, my understanding was once the Court ruled, then this would take place. In other words, the agreement was: If you ruled one way, he was going to plead guilty. If you ruled the other way, then it would be a dismissal. So I see this—we’re at that point he should plead guilty. I understand just like in any case there would be an appeal or writ, perhaps. I do think that’s sort of what our agreement was.”

Following this discussion, the court proceeded to take petitioner’s plea.

Petitioner’s counsel subsequently filed a motion to withdraw petitioner’s guilty plea. Among other things, the motion argued that good cause existed for withdrawal of petitioner’s plea because petitioner “wished to appeal, but relying on the advice of his counsel, bolstered by the discussions in the hearing between defense counsel, prosecutor, and judge of the proper way to proceed, he entered a plea and by that act foreclosed the possibility of appeal.” Petitioner’s supporting declaration stated that after his plea, an appellate attorney advised that petitioner’s guilty plea operated to foreclose his appellate rights, and to preserve those rights, petitioner would have had to submit to a court trial on the basis of the 402 hearing and be found guilty by the court. Petitioner further averred, “I was not informed of one of the substantial direct consequences of my plea—it’s effect on my appeal rights,” and entered his plea “mistakenly believing I was preserving my appeal rights, rather than destroying them.” The trial court denied petitioner’s motion to withdraw his plea.

Following sentencing, petitioner’s counsel filed a notice of appeal and request for certificate of probable cause. The trial court denied that request on March 21, 2012. The instant petition challenging that ruling was filed on June 18, 2012.

DISCUSSION

I. Timeliness of the Petition

The People urge us to deny the petition as untimely, since it was filed approximately one month beyond the usual 60-day period permitted for filing a

nonstatutory writ petition. (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701; *People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 682.) We decline to do so, in light of the difficulty petitioner's counsel experienced in attempting to obtain a reporter's transcript of the hearing on petitioner's request for a certificate of probable cause. Counsel's efforts were reasonable, particularly given this court's strict enforcement of the rule requiring a writ petitioner to furnish an adequate record for this court's review. (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187; *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 452-453; Cal. Rules of Court, rule 8.486(b)(1).)

II. Merits

Before a defendant may take an appeal from a judgment of conviction based upon a plea of guilty or nolo contendere, defendant must "fil[e] with the trial court a written statement, executed under oath or penalty of perjury[,] showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," and obtain from the trial court "a certificate of probable cause for such appeal. . . ." (§ 1237.5.)

In deciding whether to issue a certificate of probable cause, "[t]he trial court is empowered to review the statement of the grounds of the appeal to preclude those appeals which raise no issues cognizable after a guilty plea or which raise cognizable issues which are 'clearly frivolous and vexatious' [Citations.] It is not the trial court's responsibility to determine if there was an error in the proceedings. . . . The trial court's sole objective is to eliminate those appeals 'having no possible legal basis' by refusing to issue a certificate of probable cause. [Citations.] Section 1237.5 requires the trial court to certify any arguably meritorious appeal to the appellate courts. Thus, if the statement submitted by the defendant in accordance with section 1237.5 presents any cognizable issue for appeal which is not *clearly* frivolous and vexatious, the trial court abuses its discretion if it fails to issue a certificate of probable cause. [Citations.]" (*People v. Holland* (1978) 23 Cal.3d 77, 83-84, disagreed with on other grounds in *People v. Mendez* (1999) 19 Cal.4th 1084, 1093-1099 & fn. 7.) The propriety of a trial court's

refusal to issue a certificate of probable cause is reviewable on mandamus. (*In re Brown* (1973) 9 Cal.3d 679, 683; *Lara v. Superior Court* (1982) 133 Cal.App.3d 436.)

We are persuaded, on this record, that the trial court abused its discretion in failing to issue a certificate of probable cause. Petitioner seeks to raise on appeal the question of whether the court erroneously denied his motion to withdraw his plea, given petitioner's misunderstanding about the affect the plea would have on his ability to appeal the court's ruling following the 402 hearing. While it would be inappropriate at this juncture to determine that we would resolve this issue in petitioner's favor on appeal, we have no trouble concluding that this issue is "not *clearly* frivolous and vexatious. . . ." (*People v. Holland, supra*, 23 Cal.3d at p. 84) for certificate of probable cause purposes. (See *People v. DeV Vaughn* (1977) 18 Cal.3d 889, 895-896 [defendants were improperly induced to enter pleas where the trial court exceeded its power to preserve noncognizable issues for appellate review]; see also *People v. Bonwit* (1985) 173 Cal.App.3d 828, 833 [court's promise to issue certificate of probable cause to preserve a noncognizable issue for appellate review was illusory, entitling defendant the opportunity to withdraw his plea]; see also *People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575 [same].)

The People maintain that the trial court did not abuse its discretion in denying the certificate of probable cause, since petitioner agreed the court's ruling following the 402 hearing would be dispositive, "and the agreement did not contemplate appellate review of the trial court's dispositive ruling." However, the People fail to cite to any portion of the record indicating that petitioner waived appellate review as part of the negotiated disposition. We agree with petitioner that it would be inappropriate for us to imply a plea term that was not expressly stated on the record. (See *People v. Feyrer* (2010) 48 Cal.4th 426, 438.) Implying such a plea term would be especially improper here, since the record suggests the parties believed petitioner would be able to appeal the 402 hearing ruling following his plea.

The People argue that petitioner has not demonstrated the trial court abused its discretion, emphasizing that the judge who denied the certificate also presided over the negotiated disposition, the 402 hearing, petitioner's plea, petitioner's motion to withdraw

his plea, and sentencing. We fail to see how the fact that the same judge presided over all of these proceedings undermines petitioner's otherwise clear entitlement to a certificate of probable cause.

CONCLUSION AND DISPOSITION

Petitioner is entitled to the issuance of a certificate of probable cause.² We leave for later proceedings the determination of whether petitioner has raised legally cognizable issues on appeal. (See *People v. Holland, supra*, 23 Cal.3d at p. 84.)

In accordance with our notification to the parties that we might do so, we will direct issuance of a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180.) Petitioner's right to relief is obvious, and no useful purpose would be served by issuance of an alternative writ, further briefing, and oral argument. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241; see also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240-1244.)

Let a peremptory writ of mandate issue, commanding the trial court to set aside and vacate its order of March 21, 2012, denying petitioner's application for a certificate of probable cause, and enter a new and different order granting said application.

To prevent further delays, this opinion shall be final as to this court within five days of filing. (Cal. Rules of Court, rule 8.490(b)(3).)

² We find it unnecessary to reach petitioner's argument that the trial court's failure to rule on petitioner's request for a certificate of probable cause within the 20 days specified by California Rules of Court, rule 8.304(b)(2) resulted in the automatic granting of petitioner's request.